No. 3690

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE U. HIND and JAMES ROLPH, JR.,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY
(a Corporation),
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

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FILED

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I. AS TO DAMAGES

As we have dealt with this question fully in our former brief, this reply will be confined to a few references on this point to the brief of plaintiffs in error, filed since the oral argument.

Our objection to plaintiff's argument is that the principal point made in the Reply Brief is outside the record and that, while many of our statements are disputed, they are not in any way disproven. There is no evidence or admission in the record that there was any fluctuation in insurance rates, nor is it even shown when the shipment of barley was made.

All that appears from the Agreed Statement is that the war risk was paid October 24 (Par. XIII). There was certainly no evidence that there was better information concerning insurance rates in England than in San Francisco. When plaintiffs offered by the message of February 24 to pay the war risk, they must have had in mind the war risk prevailing at the time they intended to make the shipment. This is the same war risk which would have been paid, if it had been borne by the buyers. The amount of the war risk was the same, no matter who paid it. The fact is that if plaintiffs' offer to sell for 63s 9d per quarter had been accepted, the cargo would have yielded $229,180 gross. It is also true that they would have had to pay $6970 war risk, and that the net return would have been $222,210. Therefore, we repeat that

> "This offer, if accepted, would have yielded plaintiffs $229,180 gross or $222,210 net, after paying the war risk of $6970."

This satement is disputed, but nothing is offered to disprove it, except certain assumptions above referred to which are not to be found in the record. Similarly, our statement that the message, as delivered to the plaintiffs, purported to offer them $2456 more than plaintiffs asked for the barley, because the answer to this statement is based upon the same assumption. I think it may be safely asserted that practically all of plaintiffs' argument upon this point,

found at pages 8 and 9 of the Reply Brief, is based upon matters which are outside the record.

Our contention is that the measure of damage is the difference between the price which plaintiffs received and the price which they could have obtained for the barley had they not been misled by the message, provided the record shows they could have obtained any greater sum. The plaintiffs say that in this contention we are mistaken, but no other rule of damage is claimed except it is said, page 3 of the Reply Brief, as follows:

> "It was an extraordinary time, a time when a seller of grain could put his own price on his goods. It is, therefore, impossible to predicate the measure of damages or the market price."

A seller cannot *put his own price on his goods* for the purpose of fixing arbitrarily the amount of damage which another shall pay him, irrespective of market conditions. It may be there was no *particular* market price at that time. There was a market price, for there was a sale, and the Agreed Statement further shows that the price received by the plaintiffs *"was the best price which said F. Green & Co. could secure at that date."*

Counsel seeks to distinguish the authorities cited in our former brief on this point by the declaration, page 7, that the acceptance of the offer was followed by a specific and definite loss of $6970, which statement, as appears from what is said above, is not

borne out by the record. If the Court will examine the authorities cited in the Opening and Reply Briefs of the plaintiffs in error, and which are commented upon, pages 7 to 9 of the brief of defendant in error, it will appear that there is no authority to sustain the contention that the plaintiff in such case can consider the amount *which he expected* to receive as a basis for the measure of damage, in disregard of market conditions. The record does not show any loss sustained by the plaintiffs. It can be demonstrated as readily from the facts which appear that plaintiffs derived a *profit* from the transaction as that they sustained a loss, and in fact it is stipulated in the record that plaintiffs did derive a profit from the sale of $30,000 net. It nowhere appears that they would have received more, if they had not made the sale.

II. REGULATIONS CONCERNING LIMITED LIABILITY

The regulations concerning limited liability are printed in our Brief (pages 19 and 20), in the form in which they appear in the record (Trs., pages 35, 36). As to the notice that "All important telegrams should be repeated, for which an additional quarter rate is charged," it makes little difference whether this is technically a condition or a recommendation or declaration. The important thing is that it is a fact which was brought to the attention of the sender, as evidenced by his own signature. It is admitted in the Agreed Statement that the mes-

sage in suit was sent as an *unrepeated* message, and paid for as such.

Plaintiffs in error construe the condition providing against liability beyond the amount of the toll as a contract which it is claimed is void as against public policy. The argument overlooks entirely the purpose and meaning of the Interstate Commerce Act, which is defined by the Supreme Court as intended to secure uniformity and an equality, among all those who employ the telegraph as a means of interstate communication. The case of *Western Union* vs. *Esteve Bros.,* cited in our former brief, related to an unrepeated cable message, and was sent under the public regulation and condition limiting liability in case of loss to the amount of the tolls. The Supreme Court held that the condition *was not against public policy,* as counsel contend, but is valid. The Court said that when the Western Union initiated and established this reasonable rate, the principle of equality and uniformity require that it should have the same force and effect as rates initiated by rail carriers. "That uniformity demanded that the rate represent the whole duty and the *whole liability* of the Company."

But counsel contends that in the present case the extent of defendant's liability is *modified by agreement,* or, in other words, that the condition printed upon the message-blank, being an invalid contract, as asserted by counsel, the plaintiff in this case is not bound by any limitation of liability. But the

Supreme Court said in the *Esteve Bros.* case as follows:

> "If the general public upon paying the rate for an unrepeated message *accepted substantially the risk of error involved in* transmitting the message, the company could not, without granting an undue preference or advantage, *extend different* treatment to the plaintiff here."

The Court further said:

> "The limitation of liability was but the inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered."

It was said in *Postal Tel. Co.* vs. *Warren Godwin Lumber Co.,* 251 U. S. 27, referring to the regulation concerning liability upon unrepeated messages, as follows:

> "It was held that such a contract *was not one exempting the company from liability for its negligence,* but was merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and *responsibility* exacted for its performance. Such a contract was, therefore, decided to be valid, and the right to recover for error in transmitting a message, which was sent subject to it, was accordingly limited."

Counsel undertakes to construe the condition with some degree of technicality, as though it were a contract exempting the company from liability for

its negligence, whereas the Court here declares that it is merely a reasonable condition adjusting the charge to the duty and *responsibility* or liability of the company or, in other words, that unrepeated messages are forwarded *substantially at the risk of the sender*. In fact, the Court in the *Warren-Godwin* case expressly states that it was the primary purpose of the amendment to the Act to Regulate Commerce to provide a rate for unrepeated telegrams, and to fix a reasonable limitation of responsibility where such rate was charged, and pointed out "that from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest." The same Court, as stated above, in the *Esteve Bros.* case held that the uniformity in rate and liability prescribed by the Interstate Commerce Act could not be varied by agreement, and in fact that the rate was not, as before, a matter of contract by which a legal liability could be modified, *"but became as a matter of law by which a uniform liability was imposed."*

These cases, it seems, without doubt meet every aspect of the argument of plaintiffs in error. Counsel attempts to distinguish the *Esteve Bros.* case by the statement that there was no written contract between the parties, whereas in the instant case the rights of the parties are defined by a written

agreement; but in the same case it is held that the rights of the parties cannot be varied or modified in any degree by contract.

The argument is repeated by counsed at page 14, that the present case is distinguished from all the others because, first, the sender agreed that his message should be sent subject to certain conditions "and no other conditions," and, second, that the company insisted upon *limitations of liability different from other cases.* But here again the Supreme Court says this cannot be done; that all cases are subject to the same rule of uniformity of rate *and of liability.*

Again, plaintiffs in error contend that although they adopted the unrepeated message rate in the payment of the telegram, they are not bound by any limitations of liability, because "no offer was made to the sender of a rate under which the company would assume any substantial, much less full liability, for all losses suffered through the fault of the company," and that it "contracted" for the same liability for repeated as for unrepeated messages. But this the Court held in the *Esteve Bros.* case the *defendant could not do.* Its liability for an unrepeated message is fixed by law, and this the Court said "could not be varied by agreement," still less could it be varied by lack of agreement. In the *Esteve Bros.* case the same condition was made that the rule of uniformity as to liability did not apply to the plaintiffs there because there was a lack of

any actual agreement as to liability. Here it is contended there was an agreement varying the liability, neither of which is possible under the law and under the decisions.

Counsel further claims that plaintiffs in error are not subject to the rule of uniformity because they were not offered any "greater liability in case of error," in respect to a repeated message. The plaintiffs, however, were entitled to pay the same rates and have the company assume the same liability in respect to unrepeated messages as all other persons. If the defendant, by any agreement, assumed to reduce its liability in the case of *repeated* messages below what it was authorized by law to do, the agreement would be void. The alternative rates were offered to the plaintiffs *as a matter of law,* and could not be varied by agreement or lack of agreement. As said in the *Esteve Bros.* case, "The repeated rate offering greater accuracy and greater liability in case of error was open to anyone who wished to pay the extra amount for extra security." The defendant had no authority to deny that rate. If the extent of liability can be varied from the general rule by special agreement, as contended here, or by lack of agreement as contended in the *Esteve* case, the rule of uniformity and equality prescribed by the Act of Congress and by the decisions of the Supreme Court would be destroyed. As stated in our former brief, we think the language of the Supreme Court, found in the last paragraph of the

Esteve Bros. case, meets directly the contention of plaintiffs in error that the rule has no application here because no distinction was made between the unrepeated and the repeated message. The condition printed upon the blank prescribes the usual liability in the case of an unrepeated message. Whether it would be valid in the case of a repeated message does not arise in this case. On this point the Court says:

> "Whether the limitation of liability prescribed for the repeated message would be valid as against a sender who had endeavored by having the message repeated, to secure the greatest care on the part of the company, we have no occasion to decide, because it is not raised by the facts before us. It is enough to sustain the limitation of liability attached to the *unrepeated rate* that another *special rate* was offered for messages of value and importance, and not availed of. The fact that the alternative rate had tied to it a provision which, if tested, might be found to be void, is not material in a case where no effort was made to take advantage of it."

It appears from the *Esteve Bros.* case that "for more than fifty years prior to the transaction here in suit, the Western Union had maintained these two classes of rates for general cable and telegraph service; that the usual or basic rate was for service *practically at the sender's risk,* liability being limited to the amount of the toll collected." That the "rate long before established, then formally adopted and

filed, shall *thereafter be the only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent."* That the Act of 1910 was designed to and did subject companies as to their interstate business to the rule of "equality and uniformity of rates." That "if the general public, upon paying the rate for an unrepeated message, accepted substantially the risk of error involved in transmitting a message, the company could not, without granting an undue preference or advantage, extend different treatment to the *plaintiff here.* The limitation of liability *was an inherent part of the rate.* The company could no more depart from it than it could depart from the amount charged for the service rendered."

The above, says the Court, are the rules established by the Act of 1910, and which the Court further says "introduced a new principle into the legal relations of telegraph companies with their patrons which dominated and modified principles previously governing them." Before the Act of 1910, the liability of the companies was dependent upon contracts which were variously interpreted by the different States. Under the Act of 1910 these conflicting standards of liability were brought under the rule of uniformity and equality, not only as to rate but as to *liability,* because the Court says that "uniformity demanded that the rate represent the *whole duty and whole liability of the company."* The rate is no longer a matter of contract by which

a legal liability can be modified, but "as a matter of law by which a uniform liability was imposed."

We respectfully contend that the plaintiffs in error in this case can claim no exemption from this rule of uniformity. They are bound as a matter of law by the provision limiting liability for unrepeated messages because this measure of liability "is a part of the lawful established rate."

III. THE DEGREE OF NEGLIGENCE

Plaintiffs in error contend that gross negligence is shown from the fact of the error itself. The authorities cited in our former brief on this subject (pages 31-35), show that gross negligence is not to be presumed from the fact of the mistake alone, but must be proven by independent facts or circumstances which, taken in connection with the fact of the error, warrants the conclusion that there has been gross negligence. This is usually the incompetence of the operator, as in the case of *Redington* vs. *Postal Tel. Co.* and *Western Union* vs. *Cook,* cited by the plaintiffs. In the *Redington* case, gross negligence was found, not from the fact of the error, *but from the testimony of the witness called by plaintiff* to explain how the error could not have occurred except through the incompetence of the operator. In fact, the Court expressly says, as stated in our former brief, that the burden of proving gross negligence devolves upon plaintiff "and is not, in the face of the stipulation, to be pre-

sumed from the mere fact of the mistake, but must be proven by independent facts."

In *Western Union* vs. *Cook,* 61 Fed., a decision by Mr. Justice Ross, the statement that the evidence tended strongly to show gross negligence was not based upon the mere fact of the mistake, but upon the additional proof that the operator responsible for the error had had practically no experience in telegraphing for a period of over thirty years. Then follows the statement of the Court that "the evidence of the employment of such a man to transmit messages entrusted to a telegraph company not only fails to show the exercise of great care, but is strong evidence of gross negligence on its part." It is useless to argue that plaintiffs would not be in a position to prove gross negligence, because the two cases last cited contradict such contention.

In the *Pregram* case, cited in the brief of plaintiffs in error, the plaintiffs introduced evidence of independent facts tending to show gross negligence.

In *Western Union* vs. *Lange,* there was no error at all, but the loss arose from delay.

Counsel is, therefore, without authority for the statement that "the *addition of one word* of a telegram without proof of other facts constitutes gross negligence."

But the contention is made that the addition of the word "not" must be conclusively presumed to

be gross negligence, because its use is fraught with greater danger than other words. Measured by the results, its insertion in this case was much less disastrous than the insertion of an additional figure in the message in the *Esteve Bros.* case, which fact alone resulted in an admitted loss of $31,095. It is said that the addition of the word "not" changed the meaning of the message; but that is the effect of all errors in a message, for if there is no change in meaning, there would be no loss. An operator is not bound to know the meaning of all messages. Many of them are in code and many more are ambiguous, except as to the parties. The message in this case was ambiguous. It would tax the ingenuity of your Honors to sense its meaning without explanation. The word "not" occurs twice in the correct message. If it did not occur at all, there might be less justification for inserting a word entirely foreign to the message, but it is not an uncommon error in typing to repeat a word which frequently appears in the text. If your Honors should dictate a letter and when it is transcribed it should be found the word "not" is used where it was not intended, you would scarcely be justified in charging that it was done wilfully or that the negligence was gross, which, as said by the Court in the *Redington* case, "is an entire failure to exercise care, or the exercise of so little a degree of care as to justify the belief that there was an indifference to the interest and welfare of others." The fact that

the entire letter or message transcribed from symbols is accurate in every particular except in respect to one word, itself shows there was an intent to exercise care, and gross negligence will not be presumed unless there is independent proof of incompetence or indifference.

There is no greater negligence in dropping one word than another. There is no greater negligence in adding one word than another.

The error in this case was the same as in the *Esteve Bros.* case in that it consisted in the addition to the message of a character which was not there. It proved much less harmful than did the error in that case, yet the Supreme Court held there was no liability.

Respectfully submitted.

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